PP

v.

DATUK HJ WASLI HJ MOHD SAID

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
SULONG MATJERAIE J
[CRIMINAL APPEAL NO: K42-02-2005]
26 SEPTEMBER 2005

CRIMINAL PROCEDURE: *Appeal - Order of High Court - Order refusing to transfer cases from Kota Kinabalu Sessions Court to Kuala Lumpur at High Court - Whether appealable - Whether order finally disposed of rights of parties - Criminal Procedure Code, s. 307(1)*

This was an appeal by the appellant against the order of the learned Sessions Court judge refusing to transfer five criminal cases before it in Kota Kinabalu, Sabah to the High Court in Malaya, as requested by the Attorney General under s. 418A of the Criminal Procedure Code ('the CPC'). Before the commencement of the appeal proper, the respondent raised a preliminary objection on the question of whether or not the ruling made by the learned Sessions Court judge refusing to comply with the certificate issued by the Attorney General regarding the said transfer was appealable under s. 307(1) of the CPC. This was, in fact, the main issue confronting the court that would determine the outcome of this appeal.

Held (allowing the preliminary objection and dismissing the appeal):

[1] The terms "judgment", "sentence" or "order" appearing in s. 307(1) of the CPC must necessarily refer to a final order resulting in the conviction or acquittal of the accused person. In the instant case, no such order could possibly be made as the trial proper had yet to commence. The rejection of an application to transfer the cases to the High Court in Kuala Lumpur could not be said to have finally disposed of the rights of the parties. The right of the Public Prosecutor to prosecute the respondent on the five criminal charges remained intact. The appellant's argument suggesting that the order of the learned Sessions Court judge in refusing to comply with the certificate issued by the Attorney General under s. 418A of the CPC had disposed of the rights of the Attorney General was simply untenable. The issue on the transfer of cases was purely procedural and non-appealable. The respondent's preliminary objection was thereby sustained and this court

directed that the cases be heard before the Sessions Court judge in Kota Kinabalu on the dates already fixed for trial *ie*, from 3 to 31 October 2005. (pp 230 b-d & 232 a)

[Order accordingly.]

Case(s) referred to:
Jong Sin Fui v. PP [1997] 2 MLJ 860 ***(refd)***
Mohamed Anuardin Abdul Salam & Anor v. PP [1997] 3 CLJ 243 HC ***(refd)***
PP v. Hoo Chang Chwen [1962] 28 MLJ 284 ***(refd)***
PP v. RK Menon & Anor [1978] 2 MLJ 284 ***(refd)***
PP v. Rudguard [1939] MLJ 46 ***(refd)***
Zainal Hj Ali v. PP [1985] 2 MLJ 436 ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 3, 30, 84
Criminal Procedure Code, ss. 51, 129(i)(b), 307(1), 418A(1)
Federal Constitution, art. 145(3A)
Prevention of Corruption Act 1961, s. 3(b)(i)

Reported by Suresh Nathan

JUDGMENT

Sulong Matjeraie J:

Background

The appellant in this matter is appealing against the order made by the learned Sessions Court Judge who refused to transfer cases before it in Kota Kinabalu, Sabah to the High Court in Malaya as requested by the Attorney-General under s. 418A of the Criminal Procedure Code (Act 593) ('CPC').

Preliminary Objection

Before the commencement of the appeal proper, the respondent raised a preliminary objection on the question whether or not the ruling made by the learned Sessions Court Judge in refusing to comply with the certificate issued by the Attorney General to transfer the trial of the respondent from the Sessions Court in Kota Kinabalu, Sabah to the High Court in Kuala Lumpur under s. 418A(1) of the CPC is appealable under s. 307(1) of the CPC.

Facts In Brief

(1) On 12 February 2004 five (5) criminal cases against Datuk Haji Wasli bin Haji Mohd. Said (the respondent) were fixed at the Sessions Court of Kota Kinabalu comprising of two cases under s. 3(b)(i) Prevention of Corruption Act 1961 (PCA) and three (3) cases under s. 10(b)(aa) PCA, 1997 (hereinafter referred to as "these cases"). The initial plea was heard by Sessions Court Judge Datuk Nurchaya Haji Arshad (as she then was) where the accused pleaded not guilty to all the five (5) charges. Trial date was fixed for 26 July 2004 until 20 August 2004;

(2) On 16 February 2004 – an application was made by Deputy Public Prosecutor under s. 418A of the CPC to transfer the cases from the Subordinate Court of Sabah and Sarawak to the High Court of Malaya;

(3) Sessions Court Judge Datuk Nurchaya Haji Arshad (as she then was) sent this question of law to High Court Kota Kinabalu under s. 30 Courts of Judicature Act 1964 for reference of constitutional question by Subordinate Court. The cases were to be resumed on 19 February 2004 at 2.30pm but no hearing could be held as the case docket was still at High Court in Kota Kinabalu;

(4) On 1 March 2004 a ruling was made by High Court Judge, Kota Kinabalu, YA Justice Datuk Ian HC Chin where his Lordship *inter alia*, opined that the cases cannot be transferred to the High Court in Malaya as requested by the Attorney General;

(5) On 2 March, 2004 Appeal filed by the Public Prosecutor to the Court of Appeal;

(6) On 26 July 2004 – Application for adjournment of the cases for hearing of this trial before Sessions Court Judge II, Puan Caroline Bee Majanil. The cases were fixed for trial from 3 October 2005 to 31 October 2005;

(7) On 1 December 2004 Appeal heard by Court of Appeal and was duly struck out;

(8) On 3 December 2004 Notice of Motion – for an order that the Respondent's Malaysian Passport be returned to him temporarily;

(9) On 19 January 2005 – Order made by Sessions Court Judge, Kota Kinabalu, Sabah where she disallowed an application made under s. 418A of the CPC by the Public Prosecutor to transfer the cases to the High Court Malaya at Kuala Lumpur.

(10) On 19 January 2005 – Public Prosecutor filed a notice of appeal;

(11) On 17 February 2005 – Petition of Appeal filed by the Public Prosecutor;

(12) On 21 February, 2005 – Appeal Record and case docket sent to the High Court.

(13) On 14 April 2005 – Appeal was heard before the High Court where the respondent raised preliminary objections.

Appellant's Arguments

The submission of the appellant on the preliminary objection is at encl. 25 and his bundles of authorities are at encl. 24. I have gone through the said submission and his bundle of authorities thoroughly and I have also heard his oral submission in the Open Court. It was the contention of the learned counsel for the appellant SFC Encik Abdul Karim bin Abdul Jalil in his submission that the preliminary objection is misconceived and against the advice of the Court of Appeal on 1 December 2004 which according to the learned deputy allegedly states: "So you should go back to the Sessions Court and ask the Sessions Court to give a decision on the certificate tendered before the Sessions Court. If a decision is made and you are not satisfied, then you may appeal".

I implored for a copy of the transcript or the notes of proceedings but was told by the learned deputy that it was not the practice of the Court of Appeal to provide one. It was claimed that, the Court of Appeal would only issue an Order. The above statement was unfortunately not attributed to any of the learned members of the panel of the Court of Appeal judge either. Be that as it may, it seems to me the issue here is simply this:

> Whether or not the ruling made by the learned Sessions Court Judge in refusing to comply with the certificate issued by the Attorney General Malaysia to transfer the trial of the respondent from Sessions Court Kota Kinabalu to High Court Kuala Lumpur under section 418A (1) of the Criminal Procedure Code (Act 593) (CPC) is appealable under section 307(1) thereof?

The appellant argued that the decision of the learned Sessions Court Judge is an appealable order as it finally determined the rights of the Public Prosecutor to have the cases transferred to a named court pursuant to s. 418A of the CPC. It is his submission that this is a substantive law and involved substantive right conferred by the said section read together with art. 145(3A) of the Federal Constitution and that this is not purely procedural in nature. It was his contention therefore that the refusal to transfer the case to High Court at Kuala Lumpur tantamounts to affecting the rights of the Public Prosecutor, final in its effect in that it disposed of the aforesaid right.

The immediate and pertinent question to be considered is whether an order made is appealable or otherwise under s. 307(1) of the CPC.

For convenience s. 307(1) of the Criminal Procedure Code is reproduced hereunder and it reads as follows:

> Section 307 Procedure for appeal
>
> (1) Except in any case to which section 304 applies and subject to the provisions of sections 305 and 306 any person who is dissatisfied with any judgment, sentence or order by any Magistrate's Court in a criminal case or matter to which he is a party may prefer an appeal to the High Court against such judgment, sentence or order in respect of any error in law or in fact or on the ground of the alleged excessive severity or of the alleged inadequacy of any sentence by lodging, within ten days from the time of such judgment, sentence or order being passed or made, with the clerk of such Magistrate's Court a notice of appeal in triplicate addressed to the High Court and by paying at the same time the prescribed appeal fee.

There is no doubt that the phrase "any person" appearing in this section includes the Public Prosecutor, see *PP v. Rudguard* [1939] MLJ 46 where Terrell Ag. CJ said at p. 46 "Admittedly 'public prosecutor' comes under the description of 'any person' in s. 307 without being specifically mentioned …". Again there is no dispute that this is a criminal case or matter and that the appeal was filed within the specified period of ten days. The only remaining issue in contention is that the appeal lodged under s. 307 must be against any "judgment, sentence or order" pronounced by the learned Sessions Court Judge.

Under the rule of construction and interpretation of documents and statutes, where particular words describing genus or category of person or things are followed by general words, then subject to any specific contra-indication, the general words will be confined to persons or things of the same class as the particular words. Therefore the ejusdem generis rule apply to the word "order" which is preceded by the words "judgment" and "sentence" in s. 307(1) of the CPC. As such the 'order' must be a final order synonymous to the effect of the words 'judgment' and 'sentence'.

In the Supreme Court case of *Public Prosecutor v. Raymond Chia Kim Chwee & Anor. Zainal bin Hj. Ali v. Public Prosecutor* [1985] 2 MLJ 436 Hashim Yeop A. Sani SCJ (as he then was) said at p. 438 as follows:

> The word "order" is preceded by the words "judgment" and "sentence". The order must therefore be a final order in the sense that it is final in its effect as in the case of judgment or a sentence. The test for determining the finality of an order is to see whether the judgment or order finally disposes the rights of the parties.

It appears from the said case that the right of a person to ask for a document or other material in a criminal proceeding under s. 51 of the Criminal Procedure Code is a right exercisable at the discretion of the court. Thus a decision or order to issue a summons under s. 51 of the Criminal Procedure Code is a final order in the sense that it is final in its effect and therefore appealable under s. 307(1) of the Criminal Procedure Code. It is distinguishable from a purely "procedural" ruling as described in *Public Prosecutor v. Hoo Chang Chwen* [1962] 28 MLJ 284 and *Public Prosecutor v. R.K. Menon & Anor* [1978] 2 MLJ 284. These two cases had been cited with approval by our then Supreme Court in *Public Prosecutor v. Raymond Chia Kim Chwee & Anor. Zainal bin Hj. Ali v. Public Prosecutor (supra).*

In *Public Prosecutor v. Hoo Chang Chwen,* Rose CJ of Singapore dealt with an appeal on the admissibility of certain statements and the learned Judge held that the ruling of the Magistrate was a procedural ruling and therefore not an appealable order. Similarly in the case of *Public Prosecutor v. R.K. Menon & Anor,* Ajaib Singh J also took the view that a ruling on a point of law relating to non-compliance with s. 129(i)(b) of the Criminal Procedure Code was a procedural and non-appealable ruling.

Based on the above, it is clear from the decisions of the then Malaysian Supreme Court in a situation where there is a final order in the sense that it is final in its effect as in the case of a judgment or a sentence such order is appealable. On the other hand, if the ruling made is a procedural ruling such order or ruling is non appealable.

In this instant case the Attorney General Malaysia wanted these cases to be transferred from the Sessions Court in Kota Kinabalu to the High Court in Kuala Lumpur where the respondent should be tried. A certificate was issued under s. 418A(1) of the Criminal Procedure Code and was produced before the learned Sessions Court Judge at Kota Kinabalu. The learned Sessions Court Judge refused to comply with the certificate issued by the Attorney General to transfer the trial of the respondent to the High Court in Kuala Lumpur.

It would seem to me that this is nothing more than purely the transfer of these cases from one location or venue to another and at the same time from the Sessions Court Kota Kinabalu to the High Court of Malaya in Kuala Lumpur. It is a question of where the trial should take place. Should these cases be heard at the Sessions Court in Kota Kinabalu or the High Court in Kuala Lumpur as argued by the appellant?

The hearing of these cases has not even started yet. They have already been fixed for hearing from 3 October 2005 until 30 October 2005 before the learned Sessions Court Judge at Kota Kinabalu.

The Law On Appeals Under s. 307(1) Of The CPC

Any person who is dissatisfied with any judgment, sentence or order pronounced by any Magistrate's Court in a criminal case or matter to which he is a party may prefer an appeal to the High Court against such judgment, sentence or order in respect of any error in law or in fact or on the ground of the alleged excessive severity or of the alleged inadequacy of any sentence by lodging, within ten days from the time of such judgment, sentence or order being passed or made.

It has been said in *Public Prosecutor v. Raymond Chia Kim Chwee & Anor (supra)* that the order must be a final order in the sense that it is final in its effect as in the case of a judgement or a sentence. Hashim Yeop A Sani SJC (as he then was) in the said case said that the test for determining the finality of an order, is to see whether the judgment or order finally disposes of the rights of the parties.

Can one argue that the refusal to transfer these cases to Kuala Lumpur has affected the rights of the parties as envisaged by s. 307(1) of the CPC?

In my view the terms 'judgment', 'sentence' or 'order' appearing in s. 307(1) of the CPC must necessarily refer to a final order resulting in the conviction or acquittal of the accused person. It is only natural that a judgment, sentence or order in criminal proceedings must mean the final order in a trial with the end result of an acquittal or the conviction of the accused. No such order could possibly be made in this instant case as the trial proper has yet to commence. The rejection of an application to transfer these cases to the High Court in Kuala Lumpur cannot be said to have finally disposed of the rights of the parties. There is no finality of the order of the trial Court and as such it could not therefore dispose of the rights of the parties. The right of the Public Prosecutor to prosecute the respondent remains intact and the argument suggesting that the order of the learned Sessions Court Judge in refusing to comply with the certificate issued by the Attorney General under s. 418A of the CPC has disposed of the rights of the Attorney General is simply untenable.

Another issue raised by the learned counsel for the respondent, Datuk Chau Chin Tang is the effect of the amendment of s. 3 of the Courts of Judicature Act 1964. After 1998, an appeal from the High Court to the Court of Appeal would require not only finality of the decision but it must be made in the course of a trial or hearing of any cause or matter. The amendment to s. 3 of the Courts of Judicature Act 1964, especially the phrase "in the course of a trial or hearing or a cause or matter which does not finally dispose of the rights of the parties" is not found in s. 307 of the CPC and should not therefore be construed to affect its operation. Section 307 of the Criminal Procedure Code is a specific statute governing appeals from the lower court to the High Court in a criminal case or matter. As the amended s. 3 of the Courts of Judicature Act does not contain the phrase "Notwithstanding any other law", it only affects the civil or criminal appeals from the High Court to the Court of Appeal.

Apart from the authorities offered to me by the learned counsel for the appellant at encl. 24 and the authorities of the learned counsel for the respondent at encl. 19, I have also gone through other cases for reference and guidance, ie, the decision of Ajaib Singh J (as he then was) in *PP v. R.K. Menon & Anor* [1978] 2 MLJ 152, the decision of Kang Hwee Gee J in *Mohamed Anuardin bin Abdul Salam & Anor v. Pendakwa Raya* [1997] 3 CLJ 243, the decision of Steve LK Shim J (as he then was) in

Jong Sin Fui (Guardian of the child Jong Nyuk Fong) v. Public Prosecutor [1997] 2 MLJ 860. All these cases are also authorities for the proposition that when rulings are procedural in nature, they are non appealable.

Learned deputy also raised the issue that the Court of Appeal had preemptively decided that an eventual ruling made by the learned Sessions Court Judge on the matter at hand could be subject to an appeal. I do not wish to speculate on the circumstances when such remarks were made and would avoid commenting on woefully inadequate facts. Suffice it to say that knowing the wisdom of the learned members of the Court of Appeal such remarks may have been made in general terms that if the learned deputy is not satisfied with the decision of the learned Sessions Court Judge, he is at liberty to appeal. There is nothing preemptive about that.

The other alternative contentions of the learned deputy were that I should exercise my revisionary and supervisory power since the issue is not only noble but of a serious legal implication. Further the learned deputy requested me to invoke the procedure in s. 84 of the Courts of Judicature Act 1964 and thereafter to refer the constitutional issue by way of a case stated to the Federal Court for determination. My answer is simple. To me this is a clear case of a procedural ruling made by the learned Sessions Court Judge and as such the question of this court exercising its revisionary and supervisory powers does not arise at all. Further the order made by the learned Sessions Court Judge was based on a reference made under s. 30 of the Courts of Judicature Act to the learned High Court Judge YA Datuk Ian HC Chin and for obvious reason I should not exercise further revisionary power. The suggestion by the learned deputy to refer the constitutional question by way of case stated to the Federal Court is a non starter.

Finally on the contention that the decision of the learned Sessions Court Judge on 19 January 2005 is an appealable order because it finally determined the right of the Public Prosecutor to have these cases transferred to a named court pursuant to s. 418A of the CPC, I am of the considered view that such issue is not within the contemplation of s. 307(1) of the CPC. When the learned Sessions Court Judge declined to transfer these cases to Kuala Lumpur despite the certificate being issued, the rights of the Public Prosecutor to prosecute the respondent on the five charges has not been affected.

In view of what I have said earlier on, the issue on the transfer of cases is purely procedural and in my judgment is non appealable. The preliminary objection of the respondent is hereby sustained and I direct that these cases be heard before the Sessions Court Judge in Kota Kinabalu on the dates already fixed for trial ie, from 3 to 31 October 2005.